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EX PARTE OR LATE FILED

November 27, 1996

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

EX PARTE: Telecommunications Services Inside Wiring
CS Docket No. 95-184, MM Docket No. 92-260

Dear Mr. Caton:

On November 26, 1996, representatives of GTE Service Corp. and Greg Vogt of Wiley, Rein & Fielding met with Anita Wallgren, Legal Advisor to Commissioner Ness, James Coltharp, Special Counsel to Commissioner Quello, and Suzanne Toller, Legal Advisor to Commissioner Chong, to discuss the Commission's policies on inside wiring in the captioned docket. GTE presented the attached analysis of the Commission's statutory authority to adopt a second demarcation point for competitor access to cable inside wiring and a fresh look option for multiple dwelling unit owners who are in long-term contracts with incumbent cable service providers.

Due to the lateness of these meetings, GTE submits this notice today. In accordance with Section 1.1206(a)(1) of the Commission's Rules, two copies of this notice are being filed with the Secretary of the FCC. Please feel free to call me if you have any questions regarding this matter.

Sincerely,

Charon J. Harris

Attachment
cc: J. Coltharp
S. Toller
A. Wallgren

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I. THE COMMISSION HAS STATUTORY AUTHORITY TO MODIFY THE CABLE DEMARCATION POINT

- To promote competition between incumbent cable service providers and alternative multi-channel video programming distributors ("MVPDs") such as telephone service providers, the Commission must ensure that the cable service demarcation point does not serve as a barrier to entry.
  - The Commission's current cable demarcation point, which is 12 inches outside of where the cable wire enters the subscriber's individual dwelling unit, will not permit alternative MVPDs to compete with incumbent cable operators in multiple dwelling units ("MDUs") because alternative MVPDs cannot obtain access to individual subscribers without rewiring entire buildings.
  - In addition, incumbent cable operators have threatened to rip up not only the drop running to individual tenants' units, but also the common feeder lines connecting subscribers within MDUs upon competitive entry.
  - Consumers' ability to select service providers suffers because competitors cannot gain access to subscriber wiring.
- The Commission has the broad authority under the Communications Act to ensure that customers can obtain cable and other services at rates that are reasonable, and MVPD competition will necessarily exert pressure on cable service rates.
  - Section 1 requires that the Commission promote the availability of communication services to all consumers at reasonable charges.
    - While existing cable demarcation point policies encourage some degree of competition, they do not go far enough. Section 1 provides the Commission authority to enhance competitive entry and consumer choice by moving the demarcation point to a more readily accessible location.
  - The 1996 Act seeks to encourage competition among multiple providers. Indeed, the main purpose of the 1996 Act was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).
  - Section 623's requirement that rates for cable service and customer equipment be reasonable gives the Commission authority to establish which parts of a cable system are network facilities and which are customer equipment.

- Under Section 623(b)(3) of the Communications Act, the Commission must prescribe standards to establish the price or rate for installation and lease of the cable "equipment used by subscribers." *See* 47 U.S.C. § 543(b)(3) (Section 623(b)(3) of the Communications Act).

- The Commission has interpreted "equipment used by subscribers" to include inside wiring. 47 C.F.R. § 76.923(a). As part of its authority to define "equipment used by subscribers" for purposes of cable rate regulation guidelines, the Commission has the authority to establish and modify the cable demarcation point.

- Congress specifically granted the FCC broad authority to regulate cable equipment rates "to protect the interests of the consumer." H.R. Rep. No. 862, 102d Cong., 2d Sess. 64 (1992). Congress gave the FCC flexibility to chose the "best method" for achieving the goals of Section 623. *Id.* at 63.

- Congress established a clear preference for competition over regulation as a means of ensuring the reasonableness of cable rates. 47 U.S.C. 543(a) (Section 623(a) of the Communications Act).

- Accordingly, the Commission has broad authority to relocate the cable demarcation point to protect consumers' interests in competitive rates for video services and increased choices among competing MVPDs.

II. THE COMMISSION SHOULD REJECT ARGUMENTS THAT OPPOSE CHANGING THE DEMARCATION POINT FOR CABLE SERVICES

-- Argument: "Moving the demarcation point for cable service would amount to an unconstitutional taking of property without just compensation."

Response:

- Moving the cable demarcation point does not require a transfer of ownership. Thus, a cable operator may continue to own cable wiring that is on the customer side of the new demarcation point and may recover the cost of providing this wiring as "equipment used by subscribers" pursuant to 47 U.S.C. § 543(b)(3) (Section 623(b)(3) of the Communications Act).

- If an MDU building owner decides to contract with an alternative MVPD, the incumbent cable operator can be compelled to sell the common wiring in the MDU, and there is no unconstitutional "taking" because the incumbent cable operator receives just compensation. *See Cable Home Wiring*, 11 FCC Rcd 4561, 4566-67 (1996) (*First Order on Reconsideration and Further Notice of Proposed Rulemaking).*

-- *Argument: "The 1996 Act's restriction on cable/telephone company buy-outs or joint use of facilities prevents the Commission from changing the cable demarcation point."*

Response:

- The plain language of the prohibition on cable/telephone company joint ventures and buy-outs does not limit the FCC's authority to modify the demarcation point for cable service. *See* 47 U.S.C. § 652 (Section 302 of the Telecommunications Act of 1996).

- This provision was included at the request of telephone companies to ensure that leasing cable drops was not treated as an impermissible buy out. The provision codified a Commission policy adopted in the video dialtone context to permit a telephone company to lease cable drops for a brief time as a transition to the telephone company providing video services entirely over its own facilities. *See Establishment and Implementation of Video Dialtone Service*, 10 FCC Rcd 244, 269-270 (1994) (*Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*).

- To effectuate this exception to the buy-out prohibition, the Act recognizes the right of the cable operator to control use of facilities from "the last multi-user terminal to the premises of the end user." This permits limited use of the drop by the telephone company, but only with the consent of the operator. Nothing in this language precludes the FCC from defining the term "premises" by relocating the cable demarcation point. *See* 47 U.S.C. § 572(d)(3)(Section 652(d)(2) of the Communications Act).

-- *Argument: "Relocating the cable demarcation point would violate the prohibition against regulating cable operators as common carriers."*

Response:

- Changing the cable demarcation point does not subject a cable system to regulation as a common carrier by reason of its provision of cable service because an operator need not comply with Title II regulation in its provision of cable services. *See* 47 U.S.C. § 541(c) (Section 621(c) of the Communications Act); *National Assocation of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630, 641-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

- Moreover, the Commission has previously concluded that applying "similar" rules to cable and telephone companies does not amount to treating a cable operator as a common carrier. *See Telecommunications Services Inside Wiring,* 11 FCC Rcd 2747, 2768 (1996); *see also Implementation of Rate Regulation and Accounting Safeguards for the Provision of Cable Service*, 9 FCC Rcd 4527, 4533, 4539-40 (1994) (*Report and Order and Further Notice of Proposed Rulemaking*).

- Some cable companies have argued that they must retain control of inside wiring in an MDU to provide telecommunications services. Even if relocating the cable demarcation point constituted common carrier regulation, which it does not, the Commission has confirmed that Section 541(c) does not preclude regulation as a common carrier "[t]o the extent that a cable system is not providing cable service." *Telecommunications Services Inside Wiring*, 11 FCC Rcd at 2768 n.72.

-- Argument: "The 1992 Cable Act's provision permitting the FCC to establish post-termination rights of cable customers limits the Commission's authority to move the demarcation point in a multiple dwelling unit building."

Response:

- Section 624(i) requires the Commission to prescribe rules concerning the post-termination disposition to cable subscribers of wiring installed by the cable operator "within the premises of such subscriber." *See* 47 U.S.C. § 544(i) (Section 624(i) of the Communications Act). This language and its legislative history indicate that individual subscribers living in MDUs were not given rights under this section to acquire the common wiring within an MDU, but only the wiring within the dwelling unit. *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. 119 (1992).

  - Congress, however, also made clear that this was the case because otherwise there would be an increased risk of theft

of cable service within apartment buildings, and cable operators would have less control over preventing signal leakage and improper installation or maintenance, which could threaten safety services that operate on critical frequencies. *Id.* Because Section 624 by its plain language relates to the post-termination disposition to *individual cable subscribers* and not to other MVPDs who have the legal responsibility to protect against signal leakage, Section 624 does not preclude the Commission from moving the demarcation point to permit MVPDs access to the wiring outside individual subscribers' dwelling units under authority found elsewhere in the Communications Act.

- Sections 1 and 623 permit the Commission to establish the equivalent of a second demarcation point at the building's minimum point of entry or other accessible location to provide building owners and competing MVPDs the ability to change video services without damaging MDU property or creating risks of signal leakage. As the FCC has already noted, the current demarcation point for multiple dwelling units may "impede competition" in the delivery of video programming services. *See Cable Home Wiring*, 11 FCC Rcd at 4578; *Telecommunications Services Inside Wiring*, 11 FCC Rcd at 2756-57.

III. THE COMMISSION MAY IMPOSE A "FRESH LOOK" POLICY THAT APPLIES TO LONG-TERM CONTRACTS BETWEEN CABLE OPERATORS AND BUILDING OWNERS

- The Commission has implemented a "fresh look" policy in other contexts when new rules or policies promoting competition could be substantially undermined by a dominant provider who has entered into long-term contracts that effectively prevent customers from choosing a new competitor to provide service.

  - The FCC adopted a "fresh look" policy when it sought to open the market for "special access" services (dedicated lines used for local connections between a customer and an interexchange carrier) to competitive entry. Concerned about the ability of local carriers to "lock up" existing customers, the Commission gave customers with long-term access arrangements with the incumbent LEC the right to terminate those agreements, without penalty, and avail themselves of competitive alternatives. *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-7465 (1992), *recon.*, 8 FCC Rcd 7341 (1993), *vacated on other grounds and remanded for further proceedings, Bell Atlantic Tel. Cos. v. Federal*

Communications Commission, 24 F.3d 1441 (D.C. Cir. 1994).

- Similarly, the Commission also adopted a "fresh look" policy to increase competition in the toll-free 800 service marketplace. In that context, the FCC gave existing customers the option to terminate contracts for toll-free service, without liability, for a period of time after 800 numbers became "portable" among service providers. *See* ***Competition in the Interstate Interexchange Marketplace***, 6 FCC Rcd 5880, 5905-5906 (1991), *recon.*, 7 FCC Rcd 2677, 2681-2683 (1992).

- The courts have recognized Commission authority to prescribe a change in contract rates when it finds them to be unlawful and to "modify other provisions of private contracts when necessary to serve the public interest." ***Western Union Tele. Co. v. Federal Communications Commission***, 815 F.2d 1495, 1501 (D.C. Cir. 1987).